

IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

MARKWEST LIBERTY MIDSTREAM
& RESOURCES, L.L.C.,

Plaintiff,

v.

CIVIL ACTION NO. 16-C-82
JUDGE H. CHARLES CARL, III

J.F. ALLEN COMPANY; AMEC
FOSTER WHEELER ENVIRONMENT
& INFRASTRUCTURE, INC.;
REDSTONE INTERNATIONAL, INC.;
CIVIL & ENVIRONMENTAL
CONSULTANTS, INC.; and
COASTAL DRILLING EAST, LLC,

Defendants,

v.

THE LANE CONSTRUCTION
CORPORATION,

Additional Defendant.

ORDER DENYING DEFENDANT COASTAL DRILLING EAST, LLC'S
MOTION FOR SUMMARY JUDGMENT

This matter came before the Court this 10th day of February 2020, upon Defendant Coastal Drilling East, LLC's Motion for Summary Judgment. The parties have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. On a prior day, Defendant Coastal Drilling East, LLC (hereinafter “Defendant” or “Coastal”) filed the instant Motion for Summary Judgment, wherein it argued that the Court should dismiss Plaintiff’s Complaint as to it as “no contractual relationship existed between MarkWest and Coastal, no special relationship existed between MarkWest and Coastal, Coastal had no duty to MarkWest which was breached causing damages and Coastal did not MarkWest any damages in the form of delay, lost profits, oversight or otherwise”. *See* Def’s Mot., p. 1-2.

2. Thereafter, Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (hereinafter “Plaintiff” or “MarkWest”) filed its Response in Opposition to Defendant Coastal Drilling East, LLC’s Motion for Summary Judgment, arguing the gist of the action doctrine has no applicability to the negligence claim because Coastal and MarkWest have no contract and MarkWest is not asserting a breach of contract claim against Coastal. *See* Pl’s Resp., p. 1. Further, MarkWest argues in its Response that the economic loss doctrine does not apply because Coastal caused MarkWest’s property damage. *Id.* Finally, MarkWest argues in the Response that apportionment of fault and damages is a question for the trier of fact, and the record contains evidence of Coastal’s negligence and causation of harm and damages. *Id.* at 2.

3. Finally, Coastal filed its Reply to Response in Opposition by MarkWest to Coastal Drilling East, LLC’s Motion for Summary Judgment, averring that the Response to the instant motion was insufficient to raise genuine issues of material fact. *See* Reply, p. 10.

4. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF REVIEW

5. This matter comes before the Court upon a partial motion for summary judgment. Motions for summary judgment are governed by Rule 56, which states that “judgment sought

shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). West Virginia courts do “not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law.” *Alpine Property Owners Ass’n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

6. Therefore, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied “even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

7. However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).’” *Id.* at 60.

CONCLUSIONS OF LAW

8. Coastal filed the instant Motion for Summary Judgment, moving this Court for summary judgment in its favor as to “the Complaint filed against it by MarkWest”. See Def’s Mot., p. 1. The Court notes that Count V (Negligence) of Plaintiff’s Complaint is the only cause of action against Coastal. See Compl., ¶¶ 96-100.

9. Specifically, Coastal argues summary judgment in its favor is appropriate because “no contractual relationship existed between MarkWest and Coastal, no special relationship existed between MarkWest and Coastal, Coastal had no duty to MarkWest which was breached causing damages and Coastal did not cause MarkWest any damages in the form of delay, lost profits, oversight or otherwise”. See Def’s Mot., p. 1-2.

10. In seeking to prevent the recasting of a contract claim as a tort claim, courts apply the “gist of the action” doctrine. Under this doctrine, recovery in tort will be barred when any of the following factors are demonstrated:

(1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP, 231 W. Va. 577, W.Va.586, 746 S.E.2d 568, 577 (2013) (internal citations omitted). Succinctly stated, whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract. *Id. citing Goldstein v. Elk Lighting, Inc.*, No. 3:12-CV-168, 2013 WL 790765 at *3 (M.D.Pa.2013).

11. “Contract law has been traditionally concerned with the fulfillment of reasonable economic expectations. Tort law, on the other hand, is concerned with the safety of products and the corresponding quantum of care required of a manufacturer.” *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W. Va. 79, 83, 297 S.E.2d 854, 858 (1982) (quoting *Northern Power and Engineering Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324, 328 (Alaska 1981)). Under the gist of the action doctrine, whether a tort claim can coexist with a contract claim is determined by examining whether the parties’ obligations are defined by the terms of the contract. *Tri-State Petroleum Corp. v. Coyne*, 240 W. Va. 542, 814 S.E.2d 205 (2018).

12. Here, the Court cannot apply the gist of the action doctrine to find that the liability for the alleged actions described and alleged in the Complaint clearly arises from the parties’ contracts because MarkWest was only in a contract with JFA. Importantly, MarkWest did not have a contract with Coastal.

13. By way of a contractual history in this matter, the Court notes that on September 5, 2014, MarkWest and Defendant J.F. Allen Company (hereinafter “JFA”) entered into the Mobley 5 Retaining Wall Construction contract, wherein JFA was identified as the contractor responsible for the design and construction of the retaining wall at the heart of this litigation. *See* Def’s Mem., p. 2; *see also* Compl, ¶17, Compl., Ex. A.

14. Subsequently, JFA subcontracted with Defendant Redstone International, Inc. (hereinafter “Redstone”) for the construction of the wall. On August 12, 2015, Redstone was terminated by JFA. *See* Def’s Mem., p. 2. Thereafter, on August 25, 2015, Coastal entered a subcontract with JFA for a defined scope of work regarding the construction of the retaining wall. *Id.* at 3. At no time did MarkWest have a contract with Coastal.

15. Here, the Court concludes, that because there exists no contract between MarkWest and Coastal, the gist of the action doctrine, as a matter of law, has no applicability. The Court notes it is undisputed that MarkWest and Coastal are not in contractual privity. See Pl's Resp., p. 13. For this reason, summary judgment cannot be granted in Coastal's favor as to the negligence cause of action against it on the basis of the gist of the action doctrine. The Court cannot opine that MarkWest's negligence claim against *Coastal* was clearly a contract claim against *JFA* disguised as a tort claim – it would be impossible given the breach of contract claim is against *JFA* and *JFA* only, Coastal was not a party to said contract that was allegedly breached, and there existed no contract at all between MarkWest and Coastal.

16. The Court next addresses Coastal's argument that the economic loss doctrine bars MarkWest's negligence claim against Coastal because MarkWest has alleged purely economic damages based upon its contract with *JFA*. See Def's Mem., p. 14-15.

17. An individual who sustains economic loss from an interruption in commerce caused by another's negligence may not recover damages in the absence of physical harm to that individual's person or property, a contractual relationship with the alleged tortfeasor, or some other special relationship between the alleged tortfeasor and the individual who sustains purely economic damages sufficient to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor. Syl Pt. 9, *Aikens v. Debow*, 208 W. Va. 486, 489, 541 S.E.2d 576, 579 (2000).

18. The Court agrees with MarkWest that the economic loss doctrine does not apply in this instance, as it is alleged that Coastal caused MarkWest's property damage. See Pl's Resp., p. 1, 11. The economic loss doctrine can only bar a tort claim "in the absence of physical harm to [the] individual's person or property". *Aikens*, 541 S.E.2d at 579. Here, MarkWest has pled and

alleged that Coastal's negligent workmanship in construction of the retaining wall caused damage to MarkWest's property. See Pl's Resp., p. 11. MarkWest avers that as a result of negligent conduct on the part of Coastal, the retaining wall is not safe and the property above the retaining wall is near valueless currently. *Id.*

19. Finally, the Court addresses Coastal's averment in its motion that it seeks dismissal of all of MarkWest's damages claims against it, including those associated with delay, direct costs, lost profit, oversight and inspection, instrumentation and monitoring, construction costs, implementation and rectification, liens, and interest. See Def's Mem., p. 17. Coastal is seeking summary judgment as to paragraph 100 of the Complaint, wherein MarkWest states as follows: "As a direct and proximate result of Coastal's negligence, MarkWest suffered significant damages and is entitled to all such damages as a result of the negligent construction of the Retaining Wall". See Compl., ¶100; see also Def's Mem., p. 17.

20. Coastal alleges that MarkWest's claims for damages as set forth in the Complaint "are insufficiently supported for delay, direct costs, lost profit, oversight and inspection, instrumentation and monitoring, construction costs, implementation and rectification, liens and interest in any amount against Coastal based upon the testimony of its representative and expert witnesses". See Def's Mem., p. 20.

21. The Court finds this issue is inappropriate for a finding of summary judgment at this stage. Apportionment of damages and fault is a question of fact for the trier of fact. See *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 342, 256 S.E.2d 879, 885 (1979)(it will be the jury's obligation to assign the proportion or degree of this total negligence among the various parties, beginning with the plaintiff).

22. In this case, MarkWest has asserted negligence claims against many defendant subcontractors with regard to its alleged damages from the construction and design of the retaining wall. This Court finds and concludes it is for the jury to who to attribute fault and damages amounts to. This is a fact-intensive determination reserved only for the trier of fact.

23. For all of these reasons, the Court finds the instant motion must be denied.

CONCLUSION

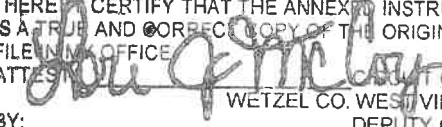

WHEREFORE, it is hereby ORDERED and ADJUDGED that Defendant Coastal Drilling East, LLC's Motion for Summary Judgment must be DENIED. The Court notes the objections of the parties to any adverse ruling herein.

The Clerk is directed to enter this Order as of the date first hereinabove appearing, and send attested copies to all counsel of record, as well as to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 10th day of February 2020.



JUDGE H. CHARLES CARL, III
West Virginia Business Court Division

I HEREBY CERTIFY THAT THE ANNEXED INSTRUMENT
IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON
FILE IN MY OFFICE.
ATTEST:  CLERK
BY:  WETZEL CO. WEST VIRGINIA
DEPUTY CLERK